BRB No. 02-0201

WILLIE SMITH	)	
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Claimant-Respondent	)	
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NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 8, 2002
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	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Motion to Reconsider of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order on Motion to Reconsider (00-LHC-3277) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, as amended, 33 U.S.C. '901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

On October 12, 1989, claimant, a rigger, whose duties for employer included climbing, building staging, and putting heavy equipment on ships, injured his left hand and ankle in a work accident, when he fell approximately 20 feet from a ladder. Claimant did not return to any work after the accident, and the parties stipulated that claimant is unable to return to his usual work.

In his Decision and Order, the administrative law judge found that employer did not establish the availability of suitable alternate employment. Specifically, the administrative law judge found that although employer demonstrated the availability of jobs suitable for claimant given his orthopedic limitations, employer did not establish that these jobs are suitable for claimant given his diabetes, high blood pressure and cardiac conditions. Decision and Order at 6. Therefore, the administrative law judge awarded claimant permanent total disability benefits.

Employer filed a motion for reconsideration, arguing that the administrative law judge erred in taking into account claimant=s hypertension and diabetes in finding that it failed to establish suitable alternate employment, as these conditions arose after claimant=s work injury. The administrative law judge rejected this contention, stating that he must take into account all of claimant=s physical conditions at the Acritical time,@ *i.e.*, the period during which claimant is able to work, citing *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The administrative law judge again found that none of the jobs identified in employer=s 2000 and 2001 labor market surveys was shown to be suitable for claimant given his diabetes.

On appeal, employer contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Employer specifically contends that the administrative law judge erred in taking into account claimant=s medical conditions which arose after the 1989 work injury. Claimant responds, urging affirmance of the award of permanent total disability benefits.

Where, as here, it is undisputed that claimant is physically unable to return to his pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. In order to meet its burden, employer must demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board (Tarner)*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer also can be relieved of liability if it establishes that claimant=s disability is due entirely to an intervening cause occurring after the work accident. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983).

In 1998, Dr. Adelaar, imposed the following permanent restrictions on claimant as a result of his work injuries: (1) lifting only 20 pounds; (2) no ladder or stair climbing; and (3) occasional crawling, kneeling, squatting, bending, standing, twisting, using vibratory tools, and working above shoulder level. CX 9. He placed

no limitation on claimant=s ability to drive. He stated claimant would qualify for only sedentary employment. Claimant=s educational testing reveals a below average reading ability and a low average mathematical ability. EX 3. Barbara Byers, employer=s vocational consultant, identified 17 jobs she believed were suitable for claimant. *Id.* On August 30, 2000, Dr. Adelaar stated, AThis patient states he is unable to work because of his diabetic status. In fact, he has difficulty driving because of his blood sugar status. These issues must also be taken into account.@ CX 12. Claimant testified that if Ahis sugar@ goes up, he cannot do anything, Tr. at 18, and that he gets dizzy if his blood pressure goes up, Tr. at 37. Claimant takes pills for his diabetes, hypertension, high cholesterol, arthritis, and pain resulting from his work injury. Tr. at 23-24. Claimant testified his diabetes developed about four years prior to the hearing (1997). Tr. at 22.

On the facts of this case, we reject employer=s contention that the administrative law judge erred in taking into account claimant=s diabetes and hypertension. Nevertheless, we must remand this case for further consideration of employer=s evidence of suitable alternate employment. We need not decide whether medical conditions which exist at the time of a labor market survey but arose after the work injury should be taken into account in evaluating claimant=s ability to perform alternate employment, as the evidence in this case supports the conclusion that claimant=s diabetes and hypertension pre-existed or were diagnosed nearly contemporaneously with the work accident. A 1990 operative report from Dr. Adelaar notes that claimant had diabetes controlled by diet, hypertension, and high cholesterol. CX 2. Although claimant=s need for medication for these conditions may have arisen after the work accident, employer must take pre-existing conditions into account in demonstrating that alternate employment is realistically available to claimant. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997). As these conditions were in existence at the time of the work injury, employer has not established that the administrative law judge erred in considering any physical limitations imposed by these conditions, nor has employer demonstrated that claimant=s condition is due entirely to an intervening cause. *See generally Lira*, 700 F.2d 1046, 15 BRBS 120(CRT).

Nonetheless, remand is required for the administrative law judge to reconsider whether employer established suitable alternate employment. Initially, the administrative law judge=s summary conclusion that the jobs employer identified are orthopedically suitable for claimant is not based on any analysis of the jobs=

[1]Ms. Byers was aware that claimant takes medication for these conditions, including Tylenol #3, for his pain. EX 3(c).

requirements or of claimant=s orthopedic restrictions. Therefore, on remand, the administrative law judge must assess each job in light of claimant=s physical restrictions, vocational history, age, and education. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Moreover, the administrative law judge=s finding that claimant cannot perform the duties of the jobs identified by employer because of his hypertension and diabetes cannot be affirmed as the mere existence of these conditions does not mean claimant is unemployable. The fact that claimant missed an appointment with Ms. Byers due to his diabetes does not establish claimant=s inability to perform the identified jobs. Tr. at 28-29. Similarly, although claimant stated his high blood pressure might cause him to become dizzy, he stated that his blood pressure is controlled by medication and that this condition does not prevent him from working. Tr. at 37. The administrative law judge also stated that, APerhaps Claimant could work some or all of the jobs that Byers identified even given his diabetes and high blood pressure. However, Employer=s evidence does not in any significant way speak to the problems that could be caused by Claimant=s cardiovascular disease problems.@ Decision and Order at 6-7. The record does not indicate that claimant has been diagnosed with any Acardiovascular disease problems@ other than hypertension and high cholesterol, and there is no evidence of record regarding any vocational Aproblems@ that claimant may have due to these conditions other than his need for medication. In 1993, Dr. Adelaar stated that claimant=s Ahistory of cardiac problems@ could prevent gainful employment in connection with claimant=s orthopedic restrictions. CX 3. This report, however, does not elaborate on what Acardiac problems@ claimant has or how they affect his employability. Contrary to the administrative law judge=s statement quoted above, employer need not account for every medical problem that could be caused by claimant=s diagnosed conditions, but need only account for the conditions documented in the record. Thus, the administrative law judge erred in stating that employer must show that prospective employers would accommodate claimant=s cardiovascular conditions, Decision and Order at 7, as the record is devoid of evidence regarding any restrictions caused by this condition. *See Fox*, 31 BRBS at 121.

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[2]The administrative law judge relied on Dr. Adelaar=s statement in 2000 that claimant reported that he has difficulty driving because of his Ablood sugar status,@ and the doctor=s conclusion that Athese issues must be taken into account@ to find that the shipyard was on notice that claimant=s cardiovascular problems must be addressed in showing suitable alternate employment. Claimant=s statement relates to diabetes, which the administrative law judge then connected to cardiovascular disease without further explanation. Decision and Order at 7. Moreover, Ms. Byers=s report states that claimant Adrives around town, to the store and to church.@ EX 2(i).

On remand, therefore, the administrative law judge should discuss each job identified by Ms. Byers in light of claimant=s age, orthopedic restrictions, any documented limitations due to his pre-existing conditions, and the medications claimant takes for all his conditions. *Hernandez*, 32 BRBS 109; *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). The administrative law judge also should discuss claimant=s limited skills in reading and arithmetic in terms of the duties of each identified job. *See generally Moore v. Universal Maritime Corp*., 33 BRBS 54 (1999); *White v. Peterson Boatbuilding Co.,* 29 BRBS 1 (1995). Consequently, we vacate the administrative law judge=s award of permanent total disability benefits, and remand the case to the administrative law judge for further proceedings consistent with this opinion. If the administrative law judge finds that claimant is not totally disabled, he must determine the extent of any partial disability claimant may have. 33 U.S.C. '908(c).

Accordingly, the administrative law judge=s Decision and Order and Order on Reconsideration are vacated, and the case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL

[3]The administrative law judge found that AClaimant=s testimony makes clear that he did <u>not</u> diligently seek work.@ Decision and Order at 7 n.4. Such a finding precludes an award of total disability benefits, if employer establishes the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

Administrative Appeals Judge